

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of	§	
	§	
Amendment of Section 1.17 of the	§	GC Docket No. 02-37
Commission's Rules Concerning	§	
Truthful Statements to the Commission	§	

REPLY COMMENTS

The Office of Public Utility Counsel (“OPC”) provides the following reply comments to Verizon’s, The Minority Media and Telecommunications Council’s (“Minor Media”), and Nickolaus E. Leggett’s (“Leggett”) comments to the proposed amendments to Section 1.17 of the Commission’s Rules Concerning Truthful Statements to the Commission:

**I.
GENERAL**

The Federal Communications Commission’s (“FCC” or “Commission”) concern that incorrect information is inimical to the public interest is well taken. Misrepresentation, even inadvertent, can wreck havoc on the remedies the Commission is attempting to shape involving the issues before the commission. To function properly, the FCC must have correct information. Unlike regulated entities, people not regulated by the FCC do not have a fiduciary duty to the FCC and, therefore, Rule 1.17 should not apply to them.

**II.
VERIZON**

Verizon makes four arguments against the Commission’s proposed rule arguing that the proposed rule is unconstitutional and contrary to the public interest.

These arguments are:

- The concepts of “material” information and for “any purpose” utilized in the rule are unconstitutionally over broad and vague ;
- The proposal to add negligent acts within the rule’s prohibitions is an unconstitutional invasion in a person’s first amendment rights;
- The proposal to apply the rules’ prohibitive acts to attorneys impermissibly invades the attorney-client relationship; and
- The proposal will discourage the filing of complaints and rulemaking contrary to the public interest.

A. Vague and Over broad

OPC agrees that the rule is over broad because it involves people not regulated by the FCC and recommends that the rule be restricted to people regulated by the FCC and its agents, including attorneys.

Verizon contends that the concepts of “material” and “bearing on any matter within the jurisdiction of the Commission” set out in the rule are unconstitutionally vague and over broad. The rule is not necessarily over broad. “Material” is a legal concept that has been given a definite meaning in evidence.¹ This term is not vague. It has a meaning that has held up in the courts for many, many years. “Bearing on any matter within the jurisdiction of the Commission” may be problematic as to oral statements. Negligent acts should be covered in a proceeding that is before the Commission and the regulated entity is a participant. If, however, a question is asked concerning a matter not in the proceeding, any oral answer should be restricted to intentional acts. OPC believes statements characterized by Verizon as “ballpark figures” should be covered if the person does not qualify the answer as a “ballpark figure”, thereby alerting the Commission the answer is not a fact to be relied upon and would warrant further investigation. The Commission may want to consider a two-step level. The first level would encompass negligent and intentional misrepresentation, directly or indirectly by omission, and would

involve the issues actually before the Commission. The second level would remove oral information as a prohibited act of negligence on issues relating to issues not before the Commission. If the Commission removes the negligence standards from oral statements involving issues not before the FCC in the proceeding involving the regulated entity, the Commission should also consider including within the rule, the caveat that it would be a misrepresentation to not identify a response as an estimate (“ballpark figure”). This is a fair compromise. Anything produced by the regulated entity in writing should be factually complete. This Commission has already recognized that regulated entities have a burden to ensure the accuracy of information they provide the Commission. See *In re Application of the Curators of the University of Missouri*, 18 FCC Rcd. 1174, ¶ 24(FCC 2000). In preparing a written as opposed to oral response, the regulated entity has the time to ensure the accuracy of its information.

The Commission may wish to consider using the term “material information relevant to the issues before the Commission”. This is a legal concept that represents a clear meaning and should withstand any attacks for vagueness or overbreadth.

The concept of negligence is not over broad. It is a legal term that has a meaning. The Commission, however, may wish to consider using the terms “knew or should have known” as opposed to negligence. This narrows the term negligence to the standard of conduct addressed in the rule.

B. Freedom of Speech.

Verizon argues that because the Commission’s rule is over broad and vague it intrudes upon the right of private parties to petition the FCC, citing *California Motor Transport Co. v.*

¹ See Black’s Law Dictionary that provides a definition of “material evidence” and “material fact.” Henry Campbell Black, *Black’s Law Dictionary*, 5th Edition (West 1979) pp. 880-881.

Trucking Unlimited, 404 U.S. 508, 612 (1972) as authority. *California Motor Transport* actually supports the Commission's rule. The Supreme Court case involved a lawsuit contending alleged frivolous lawsuits violated the Clayton Act. The Supreme Court was asked to address whether the alleged frivolous lawsuits were protected under the first amendment. The Court found that the first amendment did not immunize the plaintiffs in their frivolous lawsuits if those lawsuits were found to violate the Clayton Act. *California Motor Transport* at 513. The Court went on to say, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils'." *California Motor Transport* at 515. Consequently, the First Amendment is not absolute. Under the proposed rule, the Commission's policy is to rid its deliberative process of the evils caused by misrepresentations, inadvertent or otherwise, that would hinder the Commission's ability to shape the proper remedy on the issues before it. Regulated entities' right to freedom of speech before the FCC and the right to petition the FCC are only restricted in the rule to being sure that they are speaking truthfully and openly before the Commission. This is a necessary restriction to promote the public interest.

C. Lawyer-Client Relationship.

Citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001), Verizon contends that including attorneys under the rule would impermissibly interfere in the attorney-client relationship between regulated entity-client and the attorney. Verizon's reliance on *Valaquez* is misplaced. The *Velazquez* case did not address untruthful statements, but restrictions on legal service attorneys' rights to raise certain legal arguments. The Commission's rule does not seek to restrict an attorney's right to raise arguments. The FCC simply directs that information

supporting those arguments be truthful. As one commentator² has stated relating to broadcast licensing,

It is the licensee who is ultimately responsible for identifying and serving the needs and interests of the broadcast audience. It is also the applicant for the broadcast license who is ultimately responsible for the truth of statements made in the application. Yet, if an attorney who assists in the application knows or has reason to know that the application for a new broadcast station contains a false statement of fact or omits a material fact, the attorney also should be personally accountable for the contents of that application.

The issue addressed by this rule is not whether attorneys can make arguments before the Commission, but whether the attorneys can use half-truths to support their arguments before the Commission. It is certainly in the public interest for the Commission to have the whole truth. To paraphrase a lawyer's adage³, misrepresentations are bad facts, and they do not make good regulation.

D. Public Interest.

Verizon contends that the public interest will be hindered because people will be wary to come forward and express ideas before the Commission. While OPC believes that this would be the case for people not regulated by the FCC, OPC does not believe that regulated entities will be hindered if the Commission accepts OPC's recommendations stated above. The Commission should expect a higher standard from those whom they regulate. As the D.C. Circuit Court has recognized, licensees have a fiduciary duty to the Commission and that misrepresentations, however minor, are a cause of concern for the FCC. This is because "the Commission must proceed on the basis of absolute trust and confidence in the representations made to it by its licensees." *Sea Island Broadcasting Corporation of S.C. v. Federal Communications*

² Mark E. Wojcik, *To Tell the Truth: Should Attorneys Be Directly Accountable for the Content of applications for New Radio and Television Broadcast Stations?* 41 Depaul Law Review 329 (1992).

³ "Bad facts make bad law."

Commission, 627 F2d 240,243 (D.C. Cir. 1980). It is in the public interest that care is taken by those regulated by the FCC to come forward with meaningful information.

OPC encourages the Commission to reject Verizon's recommendations and to adopt OPC's alternative recommendations.

III. Minority Media

Minority Media's recommendation is to exclude persons not regulated by the Commission from the rule. OPC agrees with Minority Media. It is questionable whether the Commission even has jurisdiction to include people not regulated by the FCC within the rule. The FCC's authority is over regulated entities. Minority Media has already pointed out that 47 CFR § 1.16 is an adequate remedy. This remedy is consistent with law.

Members of the public are distinguishable from people regulated by the FCC and their attorneys. Licensees receiving a valuable right from the Commission have a fiduciary duty that is absent from the general public.

OPC concurs with Minority Media and encourages the FCC to exclude people not regulated by the Commission from the rule.

IV. Leggett

Mr. Leggett recommends that rulemaking be excluded from the new negligence standard. OPC agrees with Mr. Leggett as to oral statements. (See comments above relating to Verizon). OPC also agrees with Mr. Leggett to the extent that persons not regulated by the FCC should not be included in the rule.

Regulated entities should exercise caution, however, in any written comments they file before the Commission in rulemaking. (See OPC comments above relating to Verizon). A rulemaking proceeding will affect not just the regulated entity but all those who fit within the entity's classification. The provision of incomplete or untruthful information in a rulemaking proceeding becomes even more important because Commission reliance on bad information to shape its rule will have a far-reaching effect to the detriment to the public interest.

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Respectfully submitted,

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